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September 23, 2016

REDACTED - FOR PUBLIC INSPECTION

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: Business Data Services NPRM, WC Docket Nos. 16-143, 05-25, 15-247, RM-10593

Dear Ms. Dortch:

AT&T has supported the IRW Competitive Market Test that would deem a census tract competitive if two or more providers have network facilities within 2000 feet of that census tract.[1] A number of CLECs, by contrast – including INCOMPAS and its "compromise" partner Verizon – have proposed alternative Competitive Market Tests that would, among other things, count competitors as relevant only if they "have an actual customer or connection served by facilities owned by that provider" in the relevant area.[2] This more restrictive "connection" test is warranted, they say, because "[a] fiber connection indicates the presence of a nearby splice point, which ensures that the fiber is ready to be used to provide a lateral connection to a building in the same census block in which the splice point is located or in an adjacent census block."[3] While it is undeniably true that a fiber connection indicates the presence of a nearby splice point, it is also

[1] *See* Mark Israel, Daniel Rubinfeld and Glenn Woroch, Analysis of the Regressions and Other Data Relied Upon in the Business Data Services FNPRM And a Proposed Competitive Market Test, *Business Data Services in an Internet Protocol Environment; Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 16-143, 05-25, RM-10593 (filed Jun. 28, 2016) ("IRW Second White Paper").

[2] *See, e.g.*, Reply Comments of Verizon, *Business Data Services in an Internet Protocol Environment; Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 16-143, 05-25, RM-10593, at 6 (filed Aug. 9 , 2016) ("Verizon 8/9 Reply Comments"); Letter from Kathleen Grillo, Verizon, and Chip Pickering, INCOMPAS, to Marlene H. Dortch, FCC, WC Docket Nos. 16-143, 05-25, and RM-10593 (dated August 9, 2016) ("Verizon 8/9 *Ex Parte*").

[3] Verizon 8/9 Reply Comments at 6-7.

undeniably true that there are *far more* splice points in any network than there are connections, and that the number of connections is a woefully poor proxy for the number of splice points. CLECs could have, but did not, provide data on the location of splice points in their networks. Had they provided those data, it would almost certainly reveal that they follow basic network engineering principles, as does AT&T, and deploy splice points at distances that enable them to use their fiber investment to serve businesses in reasonable proximity to their fiber. Any other approach would be wholly irrational. But if the Commission is unprepared to adopt a Competitive Market Test based on the assumption of rational network engineering, it surely cannot adopt a test that assumes *irrational* network deployments. Rather, the Commission should require all non-ILEC BDS providers to disclose the location of their splice points, and base any competitive market test on those data.

Although BDS providers have not provided the locations of their splice points, they *have* provided the location of a small subset of those splice points, called "nodes," which are used to interconnect with third party networks (as well as to extend lateral connections to customers). Overall, the Commission's 2013 data collection indicates that CLECs have connections to about 269,349 buildings, but those data also show that CLECs have 157,601 locations with nodes. Thus, even if nodes represented the full universe of splice points, the CLECs' connection test would grossly understate the number of geographic areas where competitors have splice points and thus where competition exists. Indeed, the 2013 data show that non-ILECs have nodes in more than 16,000 census blocks with BDS demand where they do not also have connections, which confirms that that there are as many as 16,000 or more census blocks that would erroneously be deemed non-competitive under a connection-based test.

Of course, nodes do not even come close to representing the full universe of splice points and thus are not a valid proxy for the number of splice points. In AT&T's in-region and out-of-region networks, the number of nodes generally represent a very small portion of the total number of splice points that can be used to connect locations to AT&T's network. Indeed, Level 3 also recently acknowledged that, "[b]y limiting the data request to the subset of nodes used to interconnect with third-party networks, the Commission excluded virtually all splice points from the mandatory data request. More particularly, the Commission excluded virtually all of the splice points from which Level 3 would have actually deployed a fiber connection (*i.e.*, a lateral) from its metro backbone to serve any particular customer."[4] Thus, not only do the data confirm that a connection-based test would miss many census blocks that have nodes, it is a certainty that such a test would miss many additional census blocks that have splice points that were not reported as nodes. In short, if the connection-based Competitive Market Test is meant to be a proxy for splice points, the Commission cannot ignore its own data that show such a test would

[4] *See* Letter from Thomas Jones (Counsel to Level 3) to Marlene H. Dortch (FCC Secretary), WC Docket No. 16-143, at 4 (September 9, 2016).

fail to capture many other areas that also have splice points that are, in the words of Verizon, "ready to be used to provide a lateral connection to a building in the same census block . . . or in an adjacent census block."[5]

The economic testimony shows that the far better metric for determining whether a provider can compete for customers in an area is whether the provider has deployed a BDS network in that area. Deploying a BDS network is a substantial and expensive undertaking. Accordingly, as AT&T and others have documented, when providers deploy a BDS network in an area, basic economics and best engineering practices dictate the simple step of including splice points at regular intervals to ensure that the network is capable of serving existing and potential BDS demand in that area.[6] Failure to do so would produce a network to nowhere, and would be a colossal economic and engineering blunder. As AT&T has previously explained, its own engineering guidelines provide for splice points at intervals of **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**.[7] And it is also standard procedure to include "slack" in a fiber deployment that permits the provider to add splice points later at minimal cost.[8] This is true for both metro-fiber deployments and long-haul fiber deployments.[9]

CLECs have argued that they may not have splice points in every census block or tract where they have deployed fiber near BDS demand. But crediting these arguments would require the Commission to believe that CLECs have systematically acted against their own economic interest and against engineering best practices by deploying fiber that cannot actually serve the BDS customers in the areas where the fiber is deployed. The CLECs have provided no evidentiary or other basis on which the Commission could assume CLECs have acted so irrationally. And if this is true, the CLECs could easily put the issue to rest by submitting the locations of their splice points, but, tellingly, they have chosen to not do that.[10] The Commission

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[5] Verizon 8/9 Reply Comments at 6-7; *see Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) ("agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made" (quotation omitted)); *see also id.* ("[n]ormally, an agency rule would be arbitrary and capricious if the agency . . . offered an explanation for its decision that runs counter to the evidence before the agency").

[6] *See* Declaration of Gregg Ditullio, ¶¶ 2-14, attached hereto ("Ditullio Decl.").

[7] *See* Letter from Christopher T. Shenk (counsel for AT&T) to Marlene H. Dortch (Secretary, FCC), WC Docket No. 05-25; RM-10593, at 11, n.36 (March 21, 2016). *See also* Ditullio Decl. ¶¶ 2-14.

[8] *Id.*

[9] *Id.*

[10] Some CLECs have taken the less aggressive position that they do not necessarily have the ability to connect their long-haul fiber networks to nearby BDS demand. Once again, this argument requires the Commission to assume that BDS providers do not act rationally and that they design and deploy facilities that lack the ability to connect to

cannot lawfully adopt rules based on an assumption that all competitors are acting irrationally and deploying fiber networks without spice points at reasonable intervals. Indeed, if a BDS provider has a fiber network that is close enough to construct a connection, it would be arbitrary to assume that the provider has *not* made a splice point available (or could not readily make one available at minimal cost) to serve that customer.

For these reasons, the only approach supported by the 2013 data collection – and rational engineering and economic decision-making – is a test based on where competitors have deployed fiber facilities. AT&T thus supports the Competitive Market Test proposed by Drs. Israel, Rubinfeld and Woroch: a census tract is competitive if there are at least two providers that have deployed *network facilities* within 2,000 feet of the census tract.

Sincerely,

/s/ Christopher T. Shenk
Christopher T. Shenk
Counsel for AT&T

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locations with BDS demand. Even if fiber is initially intended to serve solely as trunk or toll fiber facilities (rather than local loop facilities), industry guidelines and engineering practices still dictate the inclusion of slack at reasonable intervals in areas where there is BDS demand, which would permit a splice point to be added later. Ditullio Decl. ¶ 9. The CLECs have provided no evidence that they do not follow these industry practices (*e.g.*, locations where they have slack or splice points in their long haul networks).